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# IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF O.S.,	)
a Child Alleged to be a	)
Child in Need of Services	)
J. Elizabeth S., Appellant,	) ) )
vs,	) No. 12A02-0710-JV-889
CLINTON COUNTY DEPARTMENT	)
OF CHILD SERVICES,	)
Appellee.	)

APPEAL FROM THE CLINTON CIRCUIT COURT The Honorable Linley E. Pearson, Judge Cause No. 12C01-0706-JV-102

May 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MATHIAS, Judge

O.S. was adjudged to be a child in need of services ("CHINS") by the Clinton Circuit Court. O.S.'s Mother appeals the adjudication arguing that it is not supported by sufficient evidence. We affirm.

### **Facts and Procedural History**

O.S. was born to Elizabeth S. ("Mother") on July 29, 2004. At birth, O.S., who was born over two weeks after her due date, weighed approximately four pounds and three ounces. O.S. has been consistently small for her age. When O.S. was approximately eleven months old, Mother became concerned about O.S.'s inability to gain weight and began to seek medical treatment for O.S. from several medical professionals.

O.S. has been hospitalized on three occasions: from January 25 through February 18, 2006 at Riley Hospital, in March 2007 at the Pediatric Rehabilitation Center, and from June 18 to June 25, 2007 at St. Vincent's Pediatric Unit. O.S. has been subjected to numerous medical tests, including at least four swallow or feeding studies, two MRIs, which required sedation, a CT Scan, two upper G.I. tests, which required O.S. to drink barium, genetic studies, bone age studies, two allergy panels, a three-day EEG test, and several tests requiring large blood draws. Tr. pp. 11-20.

While O.S. was hospitalized at Riley Hospital in 2006, she gained weight. The treating pediatrician at Riley and O.S.'s family doctor advised Mother to stop breast feeding, but Mother refused. Because of her refusal to follow medical advice, O.S. was eventually removed from Mother's care and a CHINS action was filed in Johnson County. That CHINS petition was later dismissed. Mother and O.S. then moved to

Clinton County. As a result of the move, Mother changed O.S.'s pediatrician. O.S. and Mother also began seeing an occupational therapist to work on feeding issues.

On June 11, 2007, the Clinton County Department of Child Services ("the DCS") received a report that Mother was inappropriately spanking O.S. and had told O.S. that she wished O.S. was dead. Tr. p. 221. During its investigation of the report, Mother informed the DCS that O.S. had feeding issues and that O.S. might require a feeding tube. Mother also stated that O.S. had starting having seizures. Shortly thereafter, O.S. was admitted to St. Vincent Hospital's Pediatric Unit.

Dr. Cortney Demetris treated O.S. and determined that she does have a "mild degree of swallowing dysfunction." Tr. p. 21. O.S. had also been previously diagnosed as having a chiari malformation, which occurs when the cerebral tonsils come out of the skull into the spinal column. Tr. p. 30. Dr. Demetris concluded that the chiari malformation was mild, would not expect it to cause significant problems, but O.S.'s mild swallowing dysfunction is likely related to it. Tr. p. 41. O.S. gained approximately fourteen ounces during her admission at St. Vincent's. Therefore, Dr. Demetris concluded that O.S. was capable of gaining weight when properly fed. Tr. p. 50. O.S. was observed eating a variety of foods and was "eating pretty well for a kid her age." Tr. p. 71. Yet, Mother kept requesting a feeding tube for O.S. Tr. pp. 66-67. Mother also requested neurosurgical decompression surgery to correct the chiari malformation.

Mother told Dr. Demetris that O.S. had a history of seizures, but none of O.S.'s medical records indicated any seizure activity. Mother told the doctor that during the two weeks prior to O.S.'s admission to St. Vincent's she had seizures almost every night for a

couple of minutes at 11:00 p.m. Dr. Demetris stated that Mother's description of O.S.'s seizure activity was "very unusual and not characteristic of any seizure disorder" that the doctor was aware of. Tr. p. 84. Because of Mother's claim, O.S. underwent a three-day video EEG, which did not show any seizure activity.

On June 22, 2007, Dr. Demetris had a case conference with several doctors and medical professionals who had treated O.S. The doctors came to a general consensus that O.S. was able to eat and gain weight, and Mother "had persisted [] in seeking medical care that was not indicated. [A]nd that those things were causing neglect and abuse to" O.S. Tr. p. 97. Finally, Dr. Demetris concluded that there was no medical reason for O.S.'s failure to thrive, and Mother "was likely withholding food from her [] in order to persist in the symptoms of failure to thrive." Tr. pp. 105-06.

The DCS took O.S. into custody and filed a CHINS petition on June 28, 2007. Mother denied that O.S. was a CHINS. A fact-finding hearing was held on July 25 and 26, 2007. The guardian ad litem ("the GAL") reviewed O.S.'s medical reports and noted that several doctors indicated their concern that Mother is the cause of O.S.'s failure to thrive and feared that "the same pattern will continue unless action is taken to prevent it." Appellant's App. p. 12. However, the GAL also observed that Mother

hardly resembled the person described in the reports and letters furnished by [O.S.'s] physicians. She seemed genuinely shocked that anyone would characterize her as wanting or insisting that [O.S.] undergo decompression surgery or the insertion of a feeding tube. With respect to reports of sabotaging [O.S.'s] food intake reports, [Mother] stated that all she did was vary from the Feeding Protocol that had been established for [O.S.] in minor ways[.]

Appellant's App. pp. 12-13. However, because of the "serious concerns expressed by so many of [O.S.'s] treating physicians," the GAL recommended that O.S. be found to be a CHINS. <u>Id.</u> at 13.

On August 8, 2007, the court issued its order finding that O.S. is a CHINS. In its October 11, 2007 dispositional order, the court ordered Mother to 1) complete a psychological evaluation, 2) complete a social history, 3) begin counseling, 4) notify the DCS of any household changes within twenty-four hours, and 5) continue weekly supervised visitation with O.S. The court placed O.S. in foster care. The court gave the following reasons for its disposition:

- 1. The video tapes from the hospital verified feeding problems between mother and child.
- 2. The child underwent unnecessary testing because of mother's supplying false information.
- 3. The Court is following Doctor Escobar's recommendation that the child be kept in a controlled environment for a three month period for proper evaluation.

Appellant's App. p. 21. Mother now appeals. Additional facts will be provided as necessary.

#### **Discussion and Decision**

The Fourteenth Amendment to the United States Constitution gives parents a right to establish a home and raise their children. <u>In re D.G.</u>, 702 N.E.2d 777, 781 (Ind. Ct. App. 1998). "A parent's interest in the care, custody, and control of his or her children is 'perhaps the oldest of the fundamental liberty interests." <u>Bester v. Lake County Office</u> of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005) (quoting <u>Troxel v. Granville</u>, 530

<sup>&</sup>lt;sup>1</sup> Doctor Fernando Escobar is a developmental pediatrician at the St. Vincent's Hospital Pediatric Rehab Facility. Tr. p. 89.

U.S. 57, 65 (2000)). "Indeed the parent-child relationship is 'one of the most valued relationships in our culture." <u>Id.</u> (quoting <u>Neal v. DeKalb County Div. of Family & Children</u>, 796 N.E.2d 280, 285 (Ind. 2003)). However, a parent's right to her children is balanced against the State's limited authority to interfere for the protection of the children. See D.G., 702 N.E.2d at 781.

Moreover, the CHINS statute does not require that a court wait until a tragedy occurs to intervene. Roark v. Roark, 551 N.E.2d 865, 872 (Ind. Ct. App. 1990). Rather, a child is a CHINS when he or she is endangered by parental action or inaction. Id. Further, as with parental rights terminations, the purpose of a CHINS adjudication is not to punish the parents, but to protect the children. In re A.I., 825 N.E.2d 798, 805 (Ind. Ct. App. 2005), trans. denied.

Indiana Code section 31-34-1-1 provides that a child under eighteen years old is a CHINS if:

- (1) the child's physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision; and
- (2) the child needs care, treatment, or rehabilitation that:
  - (A) the child is not receiving; and
  - (B) is unlikely to be provided or accepted without the coercive intervention of the court.

Ind. Code § 31-34-1-1 (1998 & Supp. 2007). In addition, a child under eighteen years of age is a CHINS if:

- (1) the child's physical or mental health is seriously endangered due to injury by the act or omission of the child's parent, guardian, or custodian; and
- (2) the child needs care, treatment, or rehabilitation that:

- (A) the child is not receiving; and
- (B) is unlikely to be provided or accepted without the coercive intervention of the court.

Ind. Code § 31-34-1-2(a) (1998 & Supp. 2007).

The DCS claimed that O.S. was a CHINS under section 31-34-1-1 and alleged: "[T]he child's physical health is seriously endangered due to the inability, refusal, or neglect of the mother's omission to provide appropriate nutrition and that the child needs care that is unlikely to be provided or accepted without the coercive intervention of the court." Appellant's App. p. 6. The DCS also alleged: "Mother is subjecting the child to repeated unnecessary medical testing that seriously endangers the child's physical or mental health under I.C. 31-34-1-2." <u>Id.</u>

The DCS bears the burden of proving by a preponderance of the evidence that O.S. is a CHINS. Ind. Code § 31-34-12-3 (1998). When reviewing the sufficiency of the evidence, we consider only the evidence most favorable to the judgment and the reasonable inferences flowing therefrom. Perrine v. Marion County Office of Child Servs., 866 N.E.2d 269, 273 (Ind. Ct. App. 2007). We will not reweigh the evidence or judge the credibility of witnesses. Id.

Mother argues that the evidence is insufficient to support the court's CHINS determination because O.S. has been a small child since birth, Mother has continually sought medical assistance for O.S. because of her lack of weight gain, and Mother has worked with therapists and specialists to find ways to encourage O.S. to eat. Mother also notes that all medical procedures were ordered and monitored by medical professionals,

and Mother did not place O.S. at risk by seeking medical testing to determine why O.S. is not gaining weight. <u>See</u> Br. of Appellant at 11-16.

However, Mother ignores the testimony and evidence presented that she inaccurately reported O.S.'s medical history and O.S.'s ability to eat solid food. Between the dates of June 18 and 25, 2007, O.S. gained fourteen ounces while she was admitted at the St. Vincent's Pediatric Rehab Center. Medical professionals observed O.S. eating, noted that she ate a variety of foods, and was eating well for a child her age. O.S. also gained weight while she was admitted to Riley Hospital in 2006. Moreover, treating physicians found no medical evidence to support Mother's claim that O.S. suffers from seizures.

At the June 22, 2007 case conference attended by O.S.'s various treating doctors and medical professionals, the doctors came to a general consensus that O.S. was able to eat and gain weight, and Mother "had persisted [] in seeking medical care that was not indicated. [A]nd that those things were causing neglect and abuse to" O.S. Tr. p. 97. Finally, Dr. Demetris concluded that there was no medical reason for O.S.'s failure to thrive, and Mother "was likely withholding food from her [] in order to persist in the symptoms of failure to thrive." Tr. pp. 105-06.

Under these facts and circumstances, we conclude that the DCS proved by a preponderance of the evidence that 1) Mother is the cause of O.S.'s failure to thrive and 2) Mother subjects O.S. to repeated unnecessary medical testing that endangers her physical or mental health. For all of these reasons, we conclude that the evidence is sufficient to support the court's CHINS determination.

## Affirmed.

MAY, J., and VAIDIK, J., concur.